Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED TRANSPORTATION UNION,
Petitioner,

v.

HONORABLE RODNEY SLATER, *et al.*,
Respondents.

and

NORFOLK AND WESTERN RAILWAY COMPANY,
Intervenor on Appeal.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since the Federal Railroad Administration does not have general rulemaking authority under the hours of service laws, did the FRA exceed its authority by promulgating a regulation covering reconstruction of railroad sleeping quarters?

LIST OF PARTIES

The following parties appeared before the Court of Appeals:

Petitioner:

United Transportation Union

Respondents:

Honorable Rodney Slater, Secretary of Transportation; United States Department of Transportation; Honorable Jolene Molitoris, Federal Railroad Administor; Federal Railroad Administration.

Intervenor on Appeal:

Norfolk and Western Railway Company, (a wholly owned subsidiary of Norfolk Southern Corporation).

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PETITION FOR A WRIT OF CERTIORARI

The United Transportation Union respectfully petitions for this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The ruling at issue here, of the United States Court of Appeals for the Eighth Circuit, is attached hereto. Appendix A, 1a-8a (hereinafter "App. ——").

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was entered on July 16, 1998. The mandate of the court was issued on September 11, 1998. App. B, 9a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Hours of Service Act (hereinafter "HSA") was amended by Congress in 1976 to protect employees who are required to stay in sleeping quarters provided by railroads at or near yards where there is switching of rail cars. It provided:

> Employees' hours of service
>
> (a) Limitations
>
> It shall be unlawful for any common carrier, its officers or agents, subject to this chapter—
>
> (1) . . . .
>
> (2) . . . .
>
> (3) to provide sleeping quarters for employees (including crew quarters, camp or bunk cars, and trailers) which do not afford such employees an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters; or
>
> (4) to begin construction or reconstruction of any sleeping quarters referred to in paragraph (3), on or after July 8, 1976, *within or in the immediate vicinity (as determined in accordance with rules prescribed by the Secretary)* of any area where railroad switching or humping operations are performed. (Emphasis added).

49 U.S.C. § 62 (repealed 1994)

In 1994, Congress codified the transportation safety laws. The codification legislation makes it clear that the

new law was not intended to make any substantive changes to what existed at the time of its passage. (*See* H.R. Rep. No. 180, 103d Cong., 1st Sess. 5 (1993). The new statutory provision appears at 49 U.S.C. § 21106 as follows:

A railroad carrier and its officers and agents—

(1) may provide sleeping quarters (including crew quarters, camp or bunk cars and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier; and

(2) may not begin, after July 7, 1976 construction or reconstruction of sleeping quarters referred to in clause (1) of this section *in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation,* in which railroad switching or humping operations are performed. (Emphasis added).

49 U.S.C. § 21106 (1994)

REGULATION INVOLVED

The relevant regulation provides:

§ 228.101 Distance requirement; definitions.

(a) The Hours of Service Act, as amended (45 U.S.C. 61-64b), makes it unlawful for any common carrier engaged in interstate or foreign commerce by railroad to begin, on or after July 8, 1976, the construction or reconstruction of sleeping quarters for employees who perform duties covered by the act "within or in the immediate vicinity (as determined in accordance wth rules prescribed by the Secretary of Transportation) of any area where railroad switching or humping operations are performed." 45 U.S.C. 62(a)(4). This subpart sets forth (1) a general

definition of "immediate vicinity" (§ 228.101(b)), (2) procedures under which a carrier may request a determination by the Federal Railroad Administration that a particular proposed site is not within the "immediate vicinity" of railroad switching or humping operations (§§ 228.103 and 228.105), and (3) the basic criteria utilized in evaluating proposed sites (§ 228.107).

(b) Except as determined in accordance with the provisions of this subpart. "The immediate vicinity" shall mean the area within one-half mile (2,640 feet) (804 meters) of switching or humping operations as measured from the nearest rail of the nearest trackage where switching or humping operations are performed to the point on the site where the carrier proposes to construct or reconstruct the exterior wall of the structure, or portion of such wall, which is closest to such operations.

(c) As used in this subpart—

(1) Construction shall refer to the—

(i) Creation of a new facility;

(ii) Expansion of an existing facility;

(iii) Placement of a mobile or modular facility; or

(iv) Acquisition and use of an existing building.

(2) Reconstruction shall refer to the—

(i) Replacement of an existing facility with a new facility on the same site; or

(ii) Rehabilitation or improvement of an existing facility (normal periodic maintenance excepted) involving the expenditure of an amount representing more than 50 percent of the cost of replacing such facility on the same site at the time the work of rehabilitation or improvement began, the replacement cost to be estimated on the basis of contemporary construction methods and materials.

49 C.F.R. § 228.101 (1998).

STATEMENT OF THE CASE

This case presents a classic example of a matter that warrants the grant of certiorari. There exists a split in three federal circuits regarding the scope of authority of the Federal Railroad Administration (hereinafter "FRA") to promulgate regulations under the Hours of Service Act (hereinafter "HSA"), and it involves a serious railroad safety matter.

On or about April, 1996, the Petitioner learned that the Norfolk and Western Railway Company was planning a major reconstruction of its sleeping quarters located in its railroad yard at Moberly, Missouri. The said facility is more than 30 years old and is in a dilapidated condition. The sleeping quarters contains 20 rooms for use by employees represented by Petitioner. At various times during 1996, the Petitioner informed the FRA that Petitioner opposed the remodeling on both safety and statutory grounds. *See* App. C, 10a-11a. The FRA responded to Petitioner on February 27, 1997. App. D, 12a-15a.

It is undisputed that the railroad intends to begin a major reconstruction of its sleeping quarters located at the railroad's Moberly, Missouri railroad yards. The sleeping rooms will get new ceilings, beds, paint, room darkening shades, new windows, all doors will be replaced, and the upstairs will be replaced with individually controlled heating and air conditioning units in each room. The shower areas will be redesigned to include an additional shower and private dressing rooms for each shower, new ceilings, exhaust fans, toilets, stalls, sinks, mirrors, an additional bathroom for female employees, and additional electrical outlets. Appliances in the kitchen will be replaced, a fire suppression system will be installed, and the restaurant will be renovated. Hallway and stairway doors will be replaced and additional doors will be added to insulate the sleeping rooms from noise, carpet runners in the hallways will be installed, and the ceiling and light fixtures in the hall will be replaced. The

recreation area will be painted, the washroom will have a new toilet and ceiling installed, and the locker room will be painted. The central air conditioning units in the recreation room and the restaurant will be replaced and moved into the boiler room. Lastly, the exterior of the building will be painted, the guard rail will be removed, and a fence will be placed around the dumpster area. J.A. 54-55; *see also* J.A. 52.[1]

The estimated cost of the reconstruction is $229,500.00. J.A. 49-50. In 1997, the Randolph County, Missouri Assessor appraised the current building at $129,337.00, and the land is appraised for an additional $50,000.00. J.A. 91-93. The sleeping quarters are located within 95 feet of a main rail line J.A. 64, and within 150-200 feet of a major public crossing. J.A. 45, 64. Switching of railroad equipment, including hazardous materials, commonly occurs in the yards which are located nearby.

As pointed out in *United Transportation Union v. Dole*, 797 F.2d 823 (10th Cir. 1986), the impetus for amending the HSA came from two major accidents in the mid 1970's where explosions in rail yards involving hazardous materials being switched resulted in numerous deaths:

> With the Hours of Service Act, Congress intended to improve the safety of sleeping accommodations that railroads provided for crews. Impetus for strengthening the safety standards in 1976 came from two accidents in the mid-1970s, where explosions in rail yards involving hazardous substances being switched, claimed the lives of trainmen and injured hundreds of employees and townspeople. As part of these new remedial provisions, railroads were required to maintain sleeping facilities for crews no closer than one-half mile to any area where switching or humping operations were performed. 45 U.S.C. § 62(a)(4) and 49 C.F.R. § 228.101(b) (1985).

Id. at 825.

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[1] The citation "J.A." refers to the Joint Appendix in the Eighth Circuit.

On May 15, 1976, the House Committee on Interstate and Foreign Commerce favorably reported the legislation referred to above. H.R. Rep. No. 94-1166, 94th Cong., 2d Sess. (1976) (hereinafter "H.R. Rep."). It noted the explosion in the rail yards at Decatur, Illinois on July 19, 1974, where 7 employees were killed and over 100 were injured.[2] H.R. Rep. at 11. The tank car rupture demolished the crew quarters and the eating facility in the middle of the yard. The Committee also pointed out that the labor organizations had filed a petition with the FRA in August 1974, to require every railroad to move its sleeping quarters at least one mile away from its yards, where switching or humping is performed. Concerning the previously mentioned failure of FRA to act on the petition, the Committee said, "Because of FRA's inaction, the Committee feels it must take initiative to protect workers who are forced to sleep in the railroad yards." H.R. Rep. at 11.

For the purposes of this litigation, it is significant that the only specific authority given to the Secretary by Congress is in setting the *specific distance* that a sleeping quarters must be away from switching operations. There is no other discussion anywhere in the legislative history, nor in the statute, which gives the Secretary any other rulemaking authority.[3]

In adopting the crew quarters legislation, Congress did not place a specific mileage limitation on the location of the sleeping quarters. The House Committee, in specifically limiting the Secretary's rulemaking authority, stated that "[t]he Secretary, after appropriate rulemaking, may determine that sleeping quarters shall be a specific dis-

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[2] In fact, over 300 persons were injured. See 41 Fed. Reg. 53028 (1976).

[3] The Senate Committee on Commerce did not have an opportunity to address the merits of this amendment because of the Budget Act's statutory deadline to report all authorizations for fiscal year 1977, by May 15, 1976. S. Rep. No. 855, 94th Cong., 2d Sess. 3 (1976).

tance away from the area of switching." H.R. Rep. at 11. Nowhere does the House Report discuss giving the FRA the power to promulgate regulations defining construction or reconstruction, nor to define "crew quarters." The singular power the House Report discusses in regard to the Secretary's power is to determine "specific distance."

Additionally, the Committee required that sleeping quarters for employees must be provided which "afford such employees an opportunity for rest free from interruption caused by noise under the control of a railroad, and the quarters must be clean, safe, and sanitary." H.R. Rep. at 11. The Committee said the matter of what was clean, safe, and sanitary means that it should be "free from rats, roaches, and other vermin." H.R. Rep. at 12.

The HSA amendments became effective on July 8, 1976. The FRA then published interim rules covering these amendments at 41 Fed. Reg. 53028 (1976). Concurrently, a Notice of Proposed Rulemaking was issued with respect to the interim rules adopted on the same date. 41 Fed. Reg. 53070 (1976). A public hearing on the NPRM was held on March 1, 1977. The final rule was published on July 19, 1978. 43 Fed. Reg. 31006 (1978.)

It is important that, in each of the above rulemaking proceedings, the FRA accurately repeated the limited scope of its authority, but then issued rules far beyond the limited authority given to it by Congress. The FRA said in its preamble to the initial rulemaking proceeding:

> The new provision, which became effective on July 8, 1976, makes it unlawful for any common carrier by railroad to begin construction or reconstruction of sleeping quarters for employees covered by the Act, after the effective date of the provision, *within or in the immediate vicinity (as determined in accordance with rules prescribed by the Secretary)* of

any area of railroad switching or humping operations are performed.

41 Fed. Reg. 53028 (1976) (Emphasis added).

Substantially the same quoted wording is repeated at 41 Fed. Reg. 53070-71 (1977), 42 Fed. Reg. 27895 (1977), and 43 Fed. Reg. 31006 (1978).

The significant error by the Eighth Circuit was its upholding the regulation despite the fact that the FRA had been given very limited regulatory authority. The FRA was given authority only to consider whether or not the sleeping quarters are within or in the immediate vicinity where switching or humping operations occur, and nothing else. Despite such statutory limits on its rulemaking authority under the HSA, the FRA promulgated broad sleeping quarters rules, which included defining *construction and reconstruction*, at issue in this case.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE SCOPE OF POWERS OF THE FEDERAL RAILROAD ADMINISTRATION TO PROMULGATE REGULATIONS UNDER THE HOURS OF SERVICE ACT.

The Seventh, Eighth and Tenth Circuits have reached differing conclusions regarding the powers of the FRA to promulgate regulations under the HSA.

A. The Eighth Circuit Has Concluded That Even Though the Railroad Violated the "Spirit" of the Hours of Service Act in Renovating the Sleeping Quarters at Moberly, Missouri, Under the Court's Doctrine in Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984), the Federal Railroad Adminstration's Regulations Are Given Controlling Weight.

B. The Tenth Circuit Has Concluded That Under the Hours of Service Act, a Railroad Should Make No Significant Additional Investment in Sleeping Quarters Near Hazardous Railroad Switching or Humping Operations After July 1976.

In *United Transportation Union v. Dole*, 797 F.2d 823 (10th Cir. 1986), Judge Logan, concurring in the opinion of the court, stated that Congress, in enacting § 21106(2), was frustrated with FRA's "earlier inaction on safety matters," and, consequently, intended "that a railroad should make no significant additional investment in sleeping quarters near hazardous railroad switching or humping operations after July, 1996." *Id.* at 832.

C. The Seventh Circuit Has Ruled That the Federal Railroad Administration's Interpretation of the Hours of Service Act Was Entitled to No Deference, and That the Federal Railroad Administration Has Not Been Granted General Rule-Making Authority by Congress.

The Eighth Circuit is also in conflict with the Seventh Circuit. The latter court, in *Atchison, Topeka and Santa Fe Railway Co., v. Pena*, 44 F.3d 437 (7th Cir. 1994), *aff'd*, 516 U.S. 152 (1996), concluded that FRA's interpretation of the HSA was entitled to no deference.[4] *Id.* at 439, 445. The court stated:

> While the Hours of Service Act is not unambiguous, the FRA's interpretation is not entitled to the gen-

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[4] Although the Seventh Circuit was interpreting a different section of the HSA in that case, the extent of the FRA powers was at issue.

> erous treatment afforded agency interpretations under *Chevron*. Both the railroads [5] and the FRA agree on an important point: that the FRA has not been granted rule-making authority by Congress. The Supreme Court made clear in *Chevron*, 467 U.S. at 843-44, that only statutory interpretations by agencies with rule-making powers deserve substantial deference."

Id. at 441.

The Court, in affirming the judgment of the Seventh Circuit, stated that it granted certiorari in the case "[b]ecause of the importance of uniform nationwide application of the HSA's regulatory scheme. . . ." *Pena*, 516 U.S. at 156. The divergent views of the three circuits certainly do not lend themselves to a uniform application of the HSA's regulatory scheme.

It is undisputed that the FRA does not have general rulemaking authority under the HSA. This was conceded in the Seventh Circuit case, *Pena*, 44 F.3d at 441. The FRA has sought such authority from Congress on various occasions, and has not been granted.

In prepared testimony during the current Congress, the respondent FRA Administrator again stated that "FRA lacks the regulatory authority . . . to address hours of duty of safety-sensitive employees." She also acknowledged that FRA had sought regulatory authority over the areas of hours of service in 1991 and 1994. *Reauthorization of the Federal Railroad Administration: Hearings before the Subcommittee on Railroads of the Senate Committee on Transportation and Infrastructure*, 105th Cong., 2d *Sess.* (1998) (hereinafter *1998 Hearings*). *See also Railroad Safety and H.R. 4545: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 103d

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[5] It should be noted that the Norfolk and Western Railway Company, respondent in the present litigation was one of the petitioner railroads in that case.

Cong., (1994); *Oversight and Reauthorization of Rail Safety Programs and S. 2132, The Federal Railroad Safety Authorization Act: Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation*, 103rd Cong., 2d Sess. 10 (1994); *Railroad Safety Programs (Part 2): Hearings Before the Subcommittee on Transportation of Hazardous Materials of the House Committee on Energy and Commerce*, 102d Cong., 2d Sess. 42 (1992); *Railroad Safety Programs: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 102d Cong., 1st Sess. 57-58 (1991).

The relevant provision of the statute grants FRA authority only to issue regulations determining the "immediate vicinity of an area." 49 U.S.C. § 21106(2). Nevertheless, the FRA promulgated regulations defining "reconstruction." 49 C.F.R. § 228.101. On this point, the Eighth Circuit concluded that it did not agree with the Petitioner's reading of the statute. App. A at 6a.

The cardinal rule of statutory construction is to enforce the plain language of the statute according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Whether the language is plain is "determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

Agency power is "not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (quoting *Manhattan General Equipment Co. v. Commission*, 297 U.S. 129, 134 (1936)). The issue is correctly framed as whether Congress intended to delegate such jurisdiction to the FRA. *See Bowen v. Georgetown Uni-*

versity Hospital, 488 U.S. 204, 108 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"); *INS v. Chadha*, 462 U.S. 919, 953 n.16, 955 n.19 (1983) (agency action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review," and "Congress ultimately controls administrative agencies in the legislation that creates them"). This fundamental misconception by the Eighth Circuit regarding this principle of law skewed its analysis.

The Eighth Circuit stated that it relied on *Chevron* for its decision to uphold FRA's regulation. Under *Chevron*, however, the intent of Congress must first be examined, because "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. "It is only if the intent of Congress is ambiguous that we defer to a permissible interpretation by the agency." *Chevron*, 467 U.S. at 843. The Court has stated that "[a] precondition to deference under *Chevron* is a Congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

No deference is due the FRA's construction of the HSA unless it acts within the bounds of its Congressionally-established authority. Ascertaining Congressional intent is of particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction. *See, e.g., Adams Fruit Co.*, 494 U.S. at 650 (quoting *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 745 (1973) ("An agency may not bootstrap itself into an area in which it has no jurisdiction"); *ACLU v. FCC*, 823 F.2d 1554, 1567 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) ("When an agency's assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis

of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue"); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) ("The more intense scrutiny that is appropriate when the agency interprets its own authority may be grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission").

The recognized standard for the construction and application of referential and qualifying words appears in *Sutherland Statutory Construction*:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence'. Thus a proviso usually is construed to apply to the provision or clause immediately preceding it.

2A Norman J. Singer, *Sutherland Statutory Construction* § 47.33 (5th ed. 1992)

Applying that rule to the statute at issue, the words "area or in the immediate vicinity of an area" are immediately followed and modified by the clause "as determined under regulations prescribed by the Secretary of Transportation".[6] It does not modify construction, reconstruction, or crew quarters. It modifies only "area or in the immediate vicinity of an area."

II. THERE EXISTS A SERIOUS SAFETY ISSUE WHICH IS DIRECTLY IMPACTED BY THE DECISION OF THE EIGHTH CIRCUIT.

The centerpiece of the Administration's proposed safety legislation this Congress is a provision to deal with the

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[6] We submit that the originally adopted amendment was even clearer by the modifying clauses being in parenthesis. *See* 49 U.S.C. § 62 (repealed 1994), *supra* at 2-3.

problem of fatigue. *1998 Hearings* at 203. There can be no justifiable disagreement that there exists a direct relationship between fatigue and accidents. *See, e.g.*, H.R. Rep. No. 91-469, 91st Cong., 1st Sess. 6 (1969); and *1998 Hearings*. Stress in the workplace, resulting from long and irregular work hours, has long been a source of concern for railway workers, and has recently come to the attention of society at large. When Congress amended the HSA in 1976, it was primarily concerned about the health and safety problems presented by sleeping quarters located in railroad yards. Congress intended that such sleeping quarters eventually be removed from the yards, and it prohibited any major reconstruction of their existing sleeping quarters. Keeping employees housed at locations where they cannot get proper rest creates a major fatigue problem. This has been shown to result in health problems as well. *See Bailey v. Norfolk and Western Railway Co.*, 942 S.W.2d 404 (Mo. App. 1997).

Accidents caused by human error have consistently been a significant portion of the total number of railroad accidents occurring in any given year. In the past seven years railroad accidents caused by human error have accounted for approximately one-third of all train accidents. Preliminary statistics for 1997 also show that 33% of the accidents were caused by human error. *1998 Hearings* at 804.

According to Dr. Charles Czeisler, then Director of Circadian and Sleep Disorders Medicine at Brigham and Women's Hospital in Boston, "because their reaction time is affected . . . sleep deprived people may be more prone to making mistakes on the job." New York Times, May 15, 1990, at C8. Indeed, sleep researchers indicate that sleepiness is second only to drunkenness as a cause of automobile accidents.

James Hall, Chairman of the NTSB, testified at the 1998 Hearings that "[h]uman fatigue in transportation

operation is probably the most widespread safety issue in the transportation industry, and it has been an item on the Safety Board's 'Most Wanted' list of transportation safety issues since its inception in 1990." *1998 Hearings* at 317.

He stated in his prepared testimony that "[t]he current railroad hours of service laws permit, and many railroad carriers require, the most burdensome fatigue-inducing work schedule of any federally regulated transportation mode in this country." *1998 Hearings* at 460. We submit that one of the greatest contributing factors to such fatigue is requiring tired employees to try to obtain rest in busy and very noisy rail yards, in sleeping quarters that have persons constantly talking, walking, laughing and banging doors in the hallways 24 hours a day.

James L. Kolstad, former Chairman of the National Transportation Safety Board, addressed the fatigue issue before Congress, stating:

> Human performance is still the most important factor in any accident, in any mode of transportation. An operator who is inattentive, for whatever reason, can expect to find himself in an accident sooner or later. Too often, that inattention is caused by fatigue.
>
> Railroad employees, especially train crews, are confronted by very unpredictable and tiring work schedules—a situation that has not changed since the beginning of railroading. The changing nature of railroad operations and competitive factors have increased the relative number of crew members and others in safety sensitive positions who must work irregular and unpredictable shifts—often on a long term basis.

Railroad Safety Programs: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 102d Cong., 1st Sess. at 167 (1991).

Also, Mr. Kolstad said that "[w]e have found in accident after accident that workload and work/rest issues have been critical factors." *Id.* Fatigue continues to be on the 10 Most Wanted list of the NTSB. *1998 Hearings* at 317. *See also Transportation Appropriations: Hearings Before the Subcommittee on Transportation of the House Committee on Appropriations,* 102d Cong., 1st Sess. 152 (1991) (statement of James L. Kolstad, Chairman, National Transportation Safety Board).

The FRA itself has undertaken several studies of the issue related to fatigue. *See Issues in Locomotive Crew Management and Scheduling,* U.S. Department of Transportation, Federal Railroad Administration DOT/FRA/RRP-91-01 and DOT-VNTSC-FRA-91-1 (February, 1991), and *Engineman Stress and Fatigue: Pilot Tests,* U.S. Department of Transportation, Federal Railroad Administration, DOT/FRA/ORD-92-17 (June, 1992) (Discussed in *1998 Hearings* at 793-794). In the earlier study, one of the findings was that eight hours off duty seldom translates into more than four hours sleep because of the time required to get a motel and eat, coupled with the fact that sleep will be interrupted by a telephone call two hours before the next job starts. *See 1998 Hearings* at 793-794. The sleep records of engineers in the study were irregular and atypical when compared with non-engineer participants. *Id.*

Based upon the serious consequences to safe railroad operations that arise from the opinion of the Eighth Circuit in ruling contrary to the regulatory authority granted by Congress to the FRA, this case warrants review by the Court.

CONCLUSION

Based upon the conflict in three circuits and the significant safety issue involved, we respectfully request that the Court grant the petition.

Respectfully submitted,

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October 14, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-1630

UNITED TRANSPORTATION UNION,
Petitioner,

v.

HONORABLE RODNEY SLATER, Secretary of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; HONORABLE JOLENE MOLITORIS, Federal Railroad Administor; FEDERAL RAILROAD ADMINISTRATION,
Respondents.

NORFOLK AND WESTERN RAILWAY CO.,
Intervenor on Appeal.

Petition for Review of an Order of the Federal Railroad Administration

---

Submitted: November 19, 1997

Filed: July 16, 1998

Before McMILLIAN and WOLLMAN, Circuit Judges, and STEVENS,[1] District Judge.

---

[1] The Honorable Joseph E. Stevens, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

McMILLIAN, Circuit Judge.

United Transportation Union (the union) petitions for review of a final order of the Federal Railroad Administration (the FRA), an agency within the Department of Transportation, holding that plans being carried out by Norfolk Southern Corporation (Norfolk) to renovate sleeping quarters at a switching yard in Moberly, Missouri, do not violate the Hours of Service Act (HSA), as amended in 1976, 49 U.S.C. § 21106. Norfolk and Western Railway Company [2] intervenes in support of the FRA's decision. The union filed its petition for review pursuant to 28 U.S.C. § 2344, and we have jurisdiction to review the FRA's decision pursuant to 28 U.S.C. § 2342. The union asks us to (1) order the FRA to stop the renovations of Norfolk's sleeping quarters at the Moberly site on the ground that they violate 49 U.S.C. § 21106(2) and (2) order the FRA to rule that the facility is not clean, safe, sanitary, and adequately free from noise, in violation of § 21106(1). Brief for Petitioner at 18-19. For the reasons stated below, we deny the relief requested in the petition for review.

Background

The sleeping and eating facilities for railroad workers at the Moberly, Missouri, switching yard were originally constructed over thirty years ago. It is undisputed in the present case that these living quarters are in the immediate vicinity of an area in which railroad switching operations are performed. It is also essentially undisputed that, in recent years, health and safety conditions at the Moberly site had reached intolerable levels, workers and the union complained regularly, and violations were reported by inspectors for the county and the FRA.

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[2] According to the affidavit of Eileen Meyers, a transportation analyst employed by Norfolk, Norfolk and Western Railway Company is a wholly-owned subsidiary of Norfolk. Addendum to Brief for Intervenor (Norfolk and Western Railway Company) at 1.

In or about the spring of 1996, Norfolk developed plans to renovate the sleeping and eating facilities at the Moberly site to address these problems. Upon learning of Norfolk's plans, the union complained to Norfolk that renovating the existing facilities would volate the HSA [3] because they were located too close to the switching operations. In response, Norfolk assured the union that the proposed renovations would address all past health and safety problems, including the noise problem. The union still opposed the plans, however, citing other safety concerns resulting from the facilities' proximity to the rail lines.[4] Norfolk proceeded with the renovations as planned.

---

[3] The Hours of Service Act provides in relevant part:

> A railroad carrier and its officers and agents—
>
> (1) may provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier; and
>
> (2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed.

49 U.S.C. § 21106.

[4] The impetus for Congress's enactment of § 21106(2), barring "construction or reconstruction" of sleeping quarters in or near switching or humping operations, was an accident in 1974, in Decatur, Illinois, in which seven railroad employees were killed and over 100 were injured when an explosion occurred while hazardous substances were being switched in the yard near sleeping and eating quarters. *See* Brief for Petitioner at 4-5 (citing legislative history); Brief for Respondent at 6-7 & n.6. Therefore, § 21106(2) resulted in part from Congress's desire to minimize the dangers to workers resulting from potential accidents or explosions in switching yards, not merely its desire to address the noise issue. *See*

The union next complained to the FRA in September 1996. The union's complaint to the FRA was lodged by way of a telephone call and a letter confirming that telephone call. *See* Addendum to Brief for Petitioner at 4 (letter dated Sept. 24, 1996, from the union to the FRA). The union's claims before the FRA were that (1) the proposed renovations violated 49 U.S.C. § 21106(2) because they would constitute "reconstruction" of the sleeping quarters in an area or in the immediate vicinity of an area where railroad switching or humping operations are performed and (2) the sleeping quarters would violate § 21106(1) because they would not be safe, clean, sanitary, and would not give residents an opportunity for rest free from interruptions caused by noise under Norfolk's control.

In a letter dated February 27, 1997, the FRA informed the union that it had conducted an investigation and had decided not to take any action against Norfolk at that time. *Id.* at 1-3 (letter dated Feb. 27, 1997, from the FRA to the union). The FRA explained that, although its inspector had discovered sewage problems with the underground piping system beneath the Moberly facility, the FRA was giving Norfolk a reasonable amount of time to correct the problem before it would conduct a follow-up inspection. Furthermore, the FRA stated, Norfolk's plans to renovate the Moberly site did not violate § 21106(2) because "[t]he estimated cost for remodeling the facility is approximately $200,000, . . . about 25 percent of the cost to construct a new facility," which did not meet the FRA's own regulatory definition of "reconstruction" as set forth in 49 C.F.R. § 228.101.[5] Finally, the FRA ex-

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United Transp. Union v. Dole, 797 F.2d 823, 832 (10th Cir. 1986) (Logan, J., concurring) ("I read Congress' broader intention to mean that a railroad should make no significant additional investment in sleeping quarters *near hazardous railroad switching or humping operations* after July 1976.") (emphasis added).

[5] Pursuant to the HSA amendments, the FRA has promulgated a rule defining the term "reconstruction" to include:

plained, two separate tests conducted by the FRA showed that noise levels in the sleeping quarters were below the maximum level permitted under 40 C.F.R. § 201.1 (railroad noise emissions standards) and therefore did not violate § 21106(1). Thereafter, the union timely filed the instant petition for review.

Discussion

The FRA's decision to permit Norfolk's planned renovations of the sleeping quarters at the Moberly site was based upon a determination that the renovations did not constitute "reconstruction" under 49 U.S.C. § 21106(2), as that term is defined by regulation in 49 C.F.R. § 228.101. The union argues, however, that the FRA lacked authority to promulgate that regulation because Congress intended to delegate to the FRA only *limited* authority to interpret terms within § 21106(2). More specifically, the union contends that the FRA had statutory authority to interpret only the term "immediate vicinity" because the statute provides: "A railroad carrier and its officers and agents . . . may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area *or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation*, in which railroad switching or humping operations are performed." 49 U.S.C. § 21106(2) (emphasis added). In support of this narrow interpretation of the statutory language, the union compares the fact that "[o]n various occasions the FRA has sought authority to issue

---

> [r]ehabilitation or improvement of an existing facility (normal periodic maintenance excepted) involving the expenditure of an amount representing more than 50 percent of the cost of replacing such facility on the same site at the time the work of rehabilitation or improvement began, the replacement cost to be estimated on the basis of contemporary construction methods and materials.

49 C.F.R. § 228.101.

regulations covering *hours of service*, and Congress has refused to grant such power." Brief for Petitioner at 16 (emphasis added). The union further argues that the FRA exceeded its authority in promulgating 49 C.F.R. § 228.101 because its definition of "reconstruction" contradicts the plain and ordinary meaning of the word and therefore is arbitrary, capricious, and contrary to the law. In support of this argument, the union cites several dictionary definitions of "reconstruct," which generally include terms such as "repair" and "rehabilitate." The union also suggests that the FRA's regulatory definition of "reconstruction" too readily permits, if not encourages, circumvention of the statute's intent. For this point, the union quotes from the concurring opinion in *United Transp. Union v. Dole*, 797 F.2d 823, 832 (10th Cir. 1986) (Logan, J., concurring), stating that Congress, in enacting § 21106(2), was frustrated with the FRA's "earlier inaction on safety matters" and, consequently, intended "that a railroad should make no significant additional investment in sleeping quarters near hazardous railroad switching or humping operations after July 1976."

While we agree with the union that the renovations of the sleeping quarters at the Moberly site probably violate the *spirit* of § 21106(2), through which Congress indicated its desire to phase out facilities that are located in or near switching yards, we hold that the union is bound, under the circumstances of this case, by the agency's actions. In *Chevron U.S.A., Inc. v. Natural Resources Defense, Council, Inc.*, 467 U.S. 837, 842-45 (1984) (*Chevron*), the Supreme Court explained that, unless Congress has expressly spoken to the precise question at issue and its intent is clear and unambiguous, the courts must defer to the administering agency's interpretation of the statute as set forth in the agency's regulations. Where the statute is silent or ambiguous, such legislative regulations interpreting the statute "are given controlling weight unless they are arbitrary, capricious, or manifestly

contrary to the statute. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844 (footnotes omitted).

The term "reconstruction," as used in § 21106(2), is imprecise and unclear. Therefore, under *Chevron*, the question of its precise meaning is just the kind of question for which we should defer to the administering agency for a regulatory answer. Moreover, we do not agree with the union's reading of the statute, construing § 21106(2)'s express reference to the Secretary of Transportation's rulemaking authority as a *limitation* on that authority. Nor are we persuaded by the union's analogy of the unrelated hours of service issue to the present "reconstruction" issue. We therefore defer to the administrator of the FRA, as the delegate of the Secretary of Transportation, in providing the pertinent regulatory interpretation. We conclude that the FRA's regulatory definition of "reconstruction" is not arbitrary, capricious, or contrary to law when considered in light of the HSA as a whole. The HSA has a goal of promoting "clean, safe, and sanitary" living conditions for railroad workers. 49 U.S.C. § 21106 (1). The HSA also contemplates some degree of renovation or improvement of grandfathered faciliites; otherwise, the statute would read: "A railroad carrier and its officers and agents . . . may not begin, after July 7, 1976, construction, reconstruction, *or renovation* of sleeping quarters" or something to that effect. Accordingly, we conclude that the FRA acted within its authority in promulgating 49 C.F.R. § 228.101, and we defer to the FRA's construction and application of that regulation in the present case. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) ("The [Supreme] Court has often repeated the general proposition that considerable respect is due the interpretation given [a] statute by the officers or agency charged with its administration.") (internal quotation marks omitted) (citing cases).

On the separate issue of whether the sleeping quarters are so noisy, unsafe, and insanitary as to violate § 21106 (1), the union maintains that, in light of the conclusions reached by the FRA upon inspecting the premises and its failure to take any action against Norfolk, the FRA has "close[d] its eyes to the obvious." Brief for Petitioner at 18. Therefore, the union urges this court to overturn the agency's "arbitrary action" and order the FRA to "find that the facility is not clean, safe, and sanitary, and not free from noise under the control of [Norfolk]." *Id.* at 18-19. The union, in other words, asks this court to order the FRA to find Norfolk in violation of § 21106(1) based entirely upon evidence of living conditions that no longer exist. However, the union has not identified any statutory remedy for past violations of § 21106(1). We therefore consider Norfolk's past violations, although apparently quite egregious, to be moot.[6] In sum, we hold that the union has failed to present this court with a justiciable claim under § 21106(1).

Conclusion

For the reasons stated, the relief sought by the union in its petition for review is denied.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

---

[6] We note, however, that the FRA has made the following representations to this court:

> Of course, FRA will not permit [Norfolk] to provide the Moberly facility as sleeping quarters for covered employees if it is not in compliance with the [HSA]. If [Norfolk] completes the renovation and the facility is still not in compliance, then FRA will take whatever action is necessary to ensure compliance. The agency will protect the health and safety of the railroad workers to the full extent of the law.

Brief for Respondent at 35.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-1630

UNITED TRANSPORTATION UNION,
Petitioner,

v.

HONORABLE RODNEY SLATER, Secretary of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; HONORABLE JOLENE MOLITORIS, Federal Railroad Administor; FEDERAL RAILROAD ADMINISTRATION,
Respondents.

NORFOLK AND WESTERN RAILWAY CO.,
Intervenor on Appeal.

Petition for Review of an Order of the Federal Railroad Administration

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JUDGMENT

This cause was submitted on a petition for review of an order from the Federal Railroad Administration, on the original record, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the petition for review is denied in accordance with the opinion of this Court.

July 14, 1998

A true copy.

Attest: /s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

[Mandate Issued Sep. 11, 1998]

APPENDIX C

[Logo]

UNITED TRANSPORTATION UNION
General Committee of Adjustment
Norfolk Southern - N&W - Wabash

11025-C Gravois Industrial Plaza
St. Louis, MO 63128
314-843-4554

150.12

November 13, 1996

Ms. Joline Molitoris, Administrator
Federal Railroad Administration
400 7th St. SW
Washington, DC 20590

Re: Employee Lodging, Moberly, Missouri

Dear Ms. Molitoris:

On September 23, 1996, we contacted FRA regional office in St. Louis, Missouri, challenging the proposed reconstruction of Norfolk Southern owned employee lodging facility in Moberly, Missouri. We were advised that FRA was aware of carrier's plans and was investigating immediately.

On October 28, 1996, FRA, Kansas City, advised that construction plans by Norfolk Southern are estimated at $220,000, but do not exceed one half the estimated reconstruction cost of $865,000. The final report would be issued with this conclusion.

We do not agree with purported findings in this case. However, we are unable to begin other action pending receipt of FRA final report. Inasmuch as Norfolk Southern has proceeded with its reconstruction plans, it is imperative that the final report is issued without delay.

Please initiate every possible action to expedite the release of the final report.

Thank you.

Yours truly,

/s/ K. N. Thompson
K. N. THOMPSON
General Chairman

KNT/kap

cc: C. L. Little, President, UTU
L. M. Mann, Attorney at Law
W. L. Foster, Missouri State Legislative Director
C. P. Floyd, LC, #768

APPENDIX D

[Logo]

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
Office of the Administrator
400 7th St., S.W.
Washington, D.C. 20590

[Feb. 27, 1997]

Mr. K. N. Thompson
General Chairman
United Transportation Union
11025-C Gravois Industrial Plaza
St. Louis, Missouri 63128

Dear Mr. Thompson:

The Federal Railroad Administration (FRA) completed the investigation you requested concerning the Norfolk Southern Railroad's (NS) lodging facility in Moberly, Missouri.

The Federal hours of service laws (HSL), as amended (49 U.S.C. Chapter 211), state that: "A railroad carrier and its officers and agents (1) may provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees, and any individuals employed to maintain the right-of-way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and allows those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier; and (2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed." *See* 49 U.S.C. § 21106. The

regulations promulgated by FRA set forth (1) a general definition of "immediate vicinity" (49 CFR § 228.101 (b)), (2) procedures under which a railroad carrier may request a determination by the FRA that a particular proposed site is not within the "immediate vicinity" of railroad switching or humping operations (49 CFR § 228.103 and 228.105), and (3) the basic criteria utilized in evaluating proposed sites (49 CFR § 228.107).

Except as determined in accordance with the provisions of 49 CFR Part 228, Subpart C, "the immediate vicinity" shall mean the area within one-half mile (2,640 feet) (804 meters) of switching or humping operations as measured from the nearest rail of the nearest trackage where switching or humping operations are performed to the point on the site where the carrier proposes to construct or reconstruct the exterior wall of the structure, or portion of such wall, which is closest to such operations (49 CFR § 228.101(b)). Construction refers to the creation of a new facility, expansion of an existing facility, placement of a mobile or modular facility, or acquisition and use of an existing building (49 CFR § 228.101(c)(1)). Reconstruction refers to the replacement of an existing facility with a new facility on the same site, or rehabilitation or improvement of an existing facility (normal periodic maintenance excepted) involving the expenditure of an amount representing more than 50 percent of the cost of replacing such facility on the same site at the time the work of rehabilitation or improvement began, the replacement cost is to be estimated on the basis of contemporary construction methods and materials (49 CFR § 228.101(c)(2)). In addition, the term Leq (8) shall mean the equivalent steady state sound level which in 8 hours would contain the same acoustic energy as the time-varying sound level during the same time period (49 CFR § 228.101(c)(5)).

FRA conducted an inspection of the subject lodging facility on September 24 and discovered that the railroad was experiencing sewage problems with the underground

piping system beneath the facility. This matter was brought to the attention of the railroad for corrective action. FRA will permit NS a reasonable amount of time to correct the sewer problem before conducting a follow-up inspection.

Our investigation also disclosed that the railroad anticipates remodeling the Moberly lodging facility and rail labor representatives have been included in the remodeling decisions. FRA confirmed that the railroad consulted a noise specialist, who conducted noise level tests: the tests indicate that the level of noise at the facility is below the maximum FRA permitted levels.

In addition to the noise tests, the consultant recommended several means of reducing the noise levels even further, specifically installing double pane windows in all 20 rooms, replacing exterior walls and adding insulation around the windows, installing individual heating and air-conditioning units in each room, replacing all room entrance doors with a solid door, carpeting hallways, and soundproofing each room with acoustical ceiling tiles.

The estimated cost for remodeling the facility is approximately $200,000, which is about 25 percent of the cost to construct a new facility. The railroad stipulated that remodeling would be the most economical way to improve the condition for the employees staying at the Moberly lodging facility and anticipates the start of remodeling before the end of March.

On November 25, a second observation was conducted by FRA at the Moberly, Missouri, lodging facility to focus on noise level emissions. FRA inspectors placed Metrologger Metrosonic Sound Analyzers in rooms 5, 9, and 14. The sound analyzers were placed in each room to collect noise emissions samples during a 14-hour period beginning at 5:30 p.m. on November 25 and ending at 7:30 p.m. on November 26. Rooms 5 and 14 are located at the opposite side of the main line, and room 14 was recently remodled and soundproofed. Room 9 is located

approximately 180 feet from the main line track and has not been remodeled or soundproofed. The results of the noise emission tests established that the noise levels in all three rooms did not exceed the maximum level Leq (8) value (55db) established by 40 CFR § 201.1 (Railroad Noise Emissions Standards), indicating that the facility meets the requirements of the Federal hours of service laws relative to sleeping quarters being free from noise under the control of the railroad carrier. *See* 49 U.S.C. § 21106(1).

I appreciate your interest in this matter and look forward to working with you on other safety issues that are of importance to you and your members.

Sincerely,

/s/ Jolene M. Molitoris
JOLENE M. MOLITORIS
Administrator

(2)

No. 98-627

FILED
NOV 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED TRANSPORTATION UNION,
Petitioner,

v.

HONORABLE RODNEY SLATER, *et al.*,
Respondents.

and

NORFOLK AND WESTERN RAILWAY COMPANY,
Intervenor on Appeal.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21pp

QUESTIONS PRESENTED

Whether the Federal Railroad Administration has authority under the sleeping quarters provisions of the Federal hours of service laws to issue regulations defining "reconstruction" of railroad employee sleeping quarter facilities?

Whether the Federal Railroad Administration's definition of "reconstruction" is reasonable and entitled to deference?

LIST OF PARTIES

The Intervenor in the Eighth Circuit Court of Appeals, Norfolk and Western Railway Company, agrees with the Petitioner's list of the parties involved. As a further statement of the parties involved, Norfolk and Western Railway Company was merged into Norfolk Southern Railway Company on September 1, 1998, and no longer exists. Norfolk Southern Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Norfolk and Western Railway Company[1] owns a sleeping quarters facility in Moberly, Missouri. This facility was constructed in 1966. In approximately April of 1996, Norfolk and Western decided to remodel its existing Moberly facility. (J.A. 53).[2] In deciding to remodel the existing facility, Norfolk and Western determined that the cost of building a new facility similar to the current facility in Moberly would be approximately $865,000. (J.A. 48, 69). The estimated cost of remodeling the current facility was estimated to be $200,000. (J.A. 49).

After Norfolk and Western had decided to remodel the facility, the United Transportation Union[3] ("UTU"), the Petitioner herein, asked the Federal Railroad Administration ("FRA"), to inspect the Moberly facility to determine if the plans to remodel the facility were in violation of Federal law. On February 27, 1997, the FRA issued a final order, in letter form, finding that neither the Moberly sleeping quarters facility nor the Norfolk and Western's plans to remodel the facility violated the Federal hours of service laws now codified at 49 U.S.C. §21106 (formerly codified at 45 U.S.C. §62(a)(4)). (J.A. 94-96). The FRA concluded that the estimated cost of remodeling the facility represented approximately 25% of the cost to replace a facility.

---

[1] On September 1, 1998, Norfolk and Western Railway Company ceased to exist when it was merged into Norfolk Southern Railway Company. Norfolk Southern Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation. All three Norfolk entities assert identical interests in this matter, and for ease of simplicity will use "Norfolk and Western" throughout this brief.

[2] The citation "J.A." refers to the Joint Appendix in the Eighth Circuit.

[3] The United Transportation Union's members include Norfolk and Western employees who have been housed at the Moberly facility.

(J.A. 95). Thus, the remodeling of the facility did not constitute "reconstruction" as that term is defined by the FRA in Federal regulations adopted pursuant to the Federal hours of service laws. *See* 49 C.F.R. §228.101(c).

The UTU filed a petition with the Eighth Circuit Court of Appeals seeking review of the FRA's February 27, 1997, decision. In the Eighth Circuit, the UTU contended that Norfolk and Western's decision to remodel the Moberly facility violated the Federal hours of service laws, specifically 49 U.S.C. §21106(2). The UTU argued that the FRA did not have the authority to define the term "reconstruction" as that term is used in 49 U.S.C. §21106(2) and that the FRA erred by not giving this term its "ordinary meaning."

The Eighth Circuit Court of Appeals rejected the UTU's arguments and held that the FRA acted within its authority in promulgating the definition of "reconstruction" at 49 C.F.R. §228.101. The Eighth Circuit further found that the term "reconstruction" as used within the Federal hours of service laws is imprecise and unclear. Accordingly, the Eighth Circuit stated that courts should defer to the FRA's definition of this term, since the FRA is the administrative agency charged with overseeing the Federal hours of service laws. The Eighth Circuit concluded by holding that the FRA's definition of the term "reconstruction" at 49 C.F.R. §228.101(c) is not arbitrary, capricious or contrary to law when considered in light of the Federal hours of services laws.

In 1907, Congress adopted hours of service laws regarding railroad employees. *See* 45 U.S.C. §61, *et seq.* These laws, which limit the number of hours a railroad employee could be required to work, were commonly referred to as the Hours of Service Act ("HSA"). In 1976, Congress amended the HSA to include provisions regarding employee sleeping quarters provided by the railroad. *See* 45 U.S.C. §62(a). Those provisions

provided that a railroad could not begin construction or reconstruction of any sleeping quarters after July 7, 1976, within or in the immediate vicinity or any area where railroad switching or humping operations were performed. 45 U.S.C. §62(a)(4). The HSA did not define the phrase "construction or reconstruction."

These sleeping quarters laws were enacted after an unfortunate explosion in the rail yard in Decatur, Illinois which killed several employees. The laws were intended to provide safety to employees inside sleeping quarters located within the rail yards and to "give the railroads some flexibility in constructing lodgings in the railroad yards." H.R. Rep. No. 94-1166, at 11 (1976).

The original bill considered by Congress required that railroads "provide employees with sleeping quarters . . . [that] are located away from a yard where switching or humping is performed." *Federal Railroad Safety Authorization Act of 1976: Hearings on H.R. 11804 and H.R. 11837 Before the Subcomm. on Transportation and Comm. of the Comm. on Interstate and Foreign Comm.*, 94th Cong. 6 (1976) (setting out H.R. 11804) (hereinafter referred to as "Subcommittee Hearings"). However, at the Subcommittee Hearings, representatives of the railroad industry objected to the proposed bill's application to existing facilities. *See Id.; United Transportation Union v. Dole,* 797 F.2d 823, 826 (10th Cir. 1986) (discussing the amendments to H.R. 11804). These railroad representatives pointed out that if they were required to stop using existing sleeping quarters, a large investment of money in existing facilities would be lost. *Subcommittee Hearings,* 94th Cong. 12223, 190 (statements of Harold Hall, Vice President, Transportation, Southern Railway Company (attaching exhibit from Thomas Phemister, Association of American Railroads), and John German, Vice President, Engineering MoPac Railroad Co., Texas-Pac Railway Co., ChicagoE Ill. Railroad Co., MoIll Railroad Co., and all subsidiaries). After further scrutiny by the House Committee, the proposed bill was revised to its current

form by adding a 1976 grandfather clause which involved the construction and reconstruction of existing facilities.[4] The grandfather clause preserved a railroad's sleeping quarters constructed before 1976.

After Congress adopted the laws relating to the construction and reconstruction of sleeping quarters, the FRA, published interim rules implementing the laws. *See* 41 Fed. Reg. 53,028, 53,030 (1976). In these rules, the FRA defined the word "reconstruction" as either the "replacement of an existing facility with a new facility on the same site" or the "rehabilitation or improvement of an existing facility . . . involving the expenditure, within any period of 18 months, of an amount representing more than 50% of the replacement cost of such facility at the time the program of rehabilitation or improvement began." *Id.* Concurrent with the adoption of these interim rules, the FRA filed a notice of proposed rulemaking for the adoption of final regulations relating to the 1976 amendments to the Hours of Service Act. 41 Fed. Reg. 53,070 (1976).

On July 19, 1978, and after an appropriate period for comment, argument and evaluation, the FRA issued final rules with respect to 45 U.S.C. §62(a)(4). 43 Fed. Reg. 31,006, 31,012 (1978). In defining the terms "construction" and "reconstruction", the FRA found that the actions prohibited by 45 U.S.C. §62(a)(4) "are integrally related to the types of facilities covered." 43 Fed. Reg. 31,008. The final regulations define "reconstruction" as the replacement of an existing facility with a new facility on the same site or the rehabilitation or improvement of an existing facility involving an expenditure of an amount representing no more than 50 percent of the cost of

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[4] In 1994, Congress recodified the transportation laws including the HSA. The sleeping quarters provisions of the HSA now appear at 49 U.S.C. §21106 (2), and these transportation laws are now referred to as the Federal hours of service laws.

replacing the facility on the same site at the time the rehabilitation or improvement began. 43 Fed. Reg. 31,012 (codified at 49 C.F.R. §228.101(c)(2)). Replacement cost is estimated on the basis of contemporary construction methods and materials. *Id.*

In terms of "reconstruction," the FRA believed that replacement cost of the facility, rather than the original cost of the facility, was a more realistic criteria and more capable of application, since building costs do not follow overall price trends and since the original cost of a facility may not be available at the time "reconstruction" is proposed. 43 Fed. Reg. 31,008. The FRA also found that newer facilities might use different design and material specifications which make the newer facilities not easily comparable in cost to the cost of the original construction. *Id.* Accordingly, replacement cost is to be measured on the basis of contemporary construction methods and materials used at the same site. *Id.*, at 31,009.

REASONS FOR DENYING THE WRIT

As the Eighth Circuit opinion in this case makes clear, the Eighth Circuit fully considered and correctly decided the issues presented. The Eighth Circuit carefully analyzed whether the FRA has the authority to promulgate regulations defining the word "reconstruction" and whether the FRA's definition of "reconstruction" should be accorded judicial deference. The Eighth Circuit's decision is consistent with the decisions of this Court and with other circuits which have considered the Federal hours of service laws and the FRA's authority to adopt regulations pursuant to these laws. This case does not present important issues of law. Therefore, a writ of certiorari is unwarranted and the UTU's petition should be denied.

I. THE EIGHTH CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT THE FEDERAL RAILROAD ADMINISTRATION HAD THE AUTHORITY TO DEFINE THE TERM "RECONSTRUCTION" AND THAT THE DEFINITION WAS NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO LAW.

A. The Secretary Of Transportation Has The Authority To Define "Reconstruction."

The Secretary of Transportation ("Secretary") is charged with administering and enforcing the Federal hours of service laws. 49 U.S.C. §21303; *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railroad Co,* 516 U.S. 152, 154, 116 S.Ct. 595, 596, 133 L.Ed.3d 535 (1996). The Secretary has delegated his authority to the Federal Railroad Administrator and the Federal Railroad Administration. 49 C.F.R. §1.49(d). Congress granted the Secretary, and thus the FRA, the authority to make rules and promulgate regulations which implement the sleeping quarters provisions of the Federal hours of service laws. That rulemaking authority includes the authority to issue regu-

lations defining the word "reconstruction." This authority arises from the terms of 49 U.S.C. §21106(2). This statute currently provides that a railroad carrier:

> (2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, *as determined under regulations prescribed by the Secretary of Transportation*, in which railroad switching and humping operations are performed.

49 U.S.C. §21106(2) (emphasis added).

By its own words, this statute allows the Secretary to prescribe regulations determining the "construction or reconstruction of sleeping quarters . . . in an area or in the immediate vicinity of an area." 49 U.S.C. §21106(2). The phrase "as determined under regulations prescribed by the Secretary of Transportation" is set off from the entire proceeding phrase by commas. The plain language of the statute reveals Congress' intent to grant the FRA the authority to define the word "reconstruction." The plain language reveals that the phrase "as determined under regulations prescribed by the Secretary of Transportation" modifies the whole phrase "construction or reconstruction of sleeping quarters . . . in an area or in the immediate vicinity of an area" rather than just a part of that phrase.

In addition, Congress' intent in granting the Secretary the authority to define the term "reconstruction" is evident by the fact that Congress did define some words within the Federal hours of service laws, but chose not to define the words "construction," "reconstruction," or "immediate vicinity of an area." *See* 49 U.S.C. §21101. Congress' failure to define these terms implies that such a responsibility should be given to the Secretary and thus, the FRA. Congress did, in fact, define certain words within the Federal hours of service laws, but chose not to define "construction or reconstruction." These words are not

capable of a plain language definition. If the FRA did not have the authority to define "construction or reconstruction," the sleeping quarters provisions would have little practical effect.

This Court has often explained that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz,* 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). When Congress explicitly leaves a "gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 84344, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). In the instant statute, Congress expressly left a gap in the meaning of 49 U.S.C. §21106(2) and gave the Secretary and thus, the FRA, the authority to prescribe regulations which determine the meaning of certain words, including "reconstruction."

Further evidence of Congress' intent to give the FRA the authority to issue regulations defining "reconstruction" is found in the fact that Congress has amended portions of the sleeping quarters provisions of the Federal hours of service laws without overruling the FRA's definition of "reconstruction." When Congress revisits a statute giving rise to a long-standing administrative action and does not change the statute, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974). The FRA defined "reconstruction" when it issued a final regulation in 1978. Ten years later Congress amended the sleeping quarters provisions when it added maintenance-of-way employees to the group of employees covered by 49 U.S.C. §21106(1). At that time,

however, Congress did not amend or revoke either the FRA's authority to define "reconstruction" or the FRA's definition.

B. The Federal Railroad Administration's Definition Of The Term "Reconstruction" Is Not Unreasonable, Arbitrary or Capricious.

Since the FRA has the authority to issue regulations defining "reconstruction", those regulations must be accorded judicial deference and controlling weight unless they are arbitrary, capricious or manifestly contrary to the Federal hours of service laws. *See Chevron, 467 U.S. at 843*, 104 S.Ct. at 2782. A court should accept an agency's application of a statute if it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781. In addition, a court must accept an agency's permissible construction of a statute it is charged with administering, even if that construction is not one the court itself would adopt. *Department of the Treasury, Internal Revenue Service v. Federal Labor Relations Authority*, 494 U.S. 922, 928, 110 S.Ct. 1623, 1627, 108 L.Ed.2d 914 (1990).

The FRA's interpretation of the hours of service laws is a "reasonable accommodation of [the] conflicting policies that were committed to [its] care by the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2783.

The definition of the word "reconstruction" balances a railroad's obligation to provide a safe and proper work environment for its employees, including sleeping quarters, with the financial hardship which could be placed on a railroad that happened to own and use a dormitory facility which was constructed before 1976. The Federal hours of service laws and the legislative history behind them reveal that Congress and the parties appearing before Congress were concerned about the safety of employees and lost investment if railroads could no longer use existing dormitory facilities. The insertion of the 1976 grandfather clause and the words "constructed" and "re-

constructed" provided a compromise between employee safety and the financial consequences which would be imposed on a railroad that had built sleeping quarters prior to 1976. *United Transportation Union*, 797 F.2d at 826. Congress was cognizant of the need to protect the railroads' financial stake in their buildings in light of the comments at the committee hearings as evidenced by the insertion of the grandfather clause. *United Transportation Union*, 797 F.2d at 826.

In defining the word "reconstruction" to include rehabilitation or improvement of a facility only if the expenditure involved an amount more than 50% of the replacement cost, the FRA implemented the concerns of Congress in balancing a railroad's financial interest in existing facilities with the need to provide sleeping quarters a certain distance away from switching and humping operations for the safety of employees. In addition, the FRA was cognizant of modern construction practices when it used the cost of replacing the facility estimated on the basis of contemporary construction methods and materials within the definition of "reconstruction." *See* 43 Fed. Reg. 31,008-31,009. Accordingly, there exists a reasonable, rational basis for the FRA's definition of "reconstruction" as evidenced by the legislative history of the sleeping quarters statute.[5] That definition is not arbitrary, capricious or unreasonable and must be accorded deference by the courts of our country.

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[5] Even if, as the UTU contends, the FRA does not have the authority to define "reconstruction", its definition of "reconstruction" should still be accorded deference. *Morton*, 415 U.S. at 237, 94 S.Ct. at 1075; *Pelofsky v. Wallace*, 102 F.3d 350, 353 (8th Cir. 1996). As explained above, the FRA's definition, which was adopted after notice and comment from all interested parties, balances the need for employee safety with the railroad's financial investment in dormitory facilities. *See* 41 Fed. Reg. 53,028; 41 Fed. Reg. 53,070; 43 Fed. Reg. 31,006. The enforcement of the Federal hours of service laws without a workable definition of reconstruction would be arbitrary and capricious.

C. The Eighth Circuit Court of Appeals Correctly Found That The Federal Railroad Administration Has The Authority To Define "Reconstruction" And That The Federal Railroad Administration's Definition Is Reasonable.

The Eighth Circuit acted correctly in holding that the FRA acted within its authority in promulgating the Federal regulations which implement 49 U.S.C. §21106(2), including the definition of "reconstruction," and in deferring to the FRA's construction and application of that regulation in this case. The Eighth Circuit considered, but rejected, the UTU's arguments that the FRA did not have the authority to define reconstruction and that its definition should not be accorded any weight. The Eighth Circuit acknowledged that the term "reconstruction" as used in §21106(2) was imprecise and unclear and in need of definition. Following this Court's decision in *Chevron*, the Eighth Circuit then found that it should defer to the regulations issued by the administrative agency (the FRA) in charge of administering and enforcing the sleeping quarters provisions of the Federal hours of service laws. The Eighth Circuit concluded correctly that the definition of "reconstruction" was not arbitrary, capricious or contrary to law when considered in light of the hours of service laws as a whole and the laws' goal of promoting safe living conditions for railroad workers while preserving a railroad's financial stake in sleeping quarters facilities built prior to July 7, 1976.

The Eighth Circuit's decision follows this Court's standards for reviewing the actions of an administrative agency and upholds the intent of Congress in enacting the hours of service laws and the goals those laws attempt to promote. The UTU's arguments cannot prevail and its petition for writ of certiorari should be denied.

II. THERE IS NO SPLIT IN THE CIRCUITS REGARDING THE SCOPE OF AUTHORITY OF THE FEDERAL RAILROAD ADMINISTRATION TO PROMULGATE REGULATIONS UNDER THE FEDERAL HOURS OF SERVICE LAWS.

The UTU contends that this Court should accept their petition for writ of certiorari because there is a conflict among the Seventh, Eighth and Tenth Circuit Court of Appeals regarding the scope of the FRA's authority to promulgate regulations under the Federal hours of service laws. The UTU, however, attempts to create a conflict where none exists.

First, as discussed *supra*, the Eighth Circuit Court of Appeals properly found that the FRA acted within its authority in promulgating the definition of "reconstruction" and that the FRA's interpretation and application of the sleeping quarter provisions of the Federal hours of service laws are entitled to deference. The UTU attempts to create a conflict between the Eighth Circuit's decision and the Tenth Circuit's decision in *United Transportation Union.* The Tenth Circuit in *United Transportation Union*, however, did not discuss or decide whether the FRA had the authority to issue regulations defining the terms in the sleeping quarter provisions of the Federal hours of service laws.[6] *United Transportation Union*, 797 F.2d at 823. The issue of the FRA's authority to issue regulations was not presented in that case.

Still seeking to create a conflict, the UTU refers this Court to Justice Logan's concurrence in *United Transportation Union* where he stated that "a railroad should make no significant additional investment in sleeping quarters near hazardous rail-

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[6] The *United Transportation Union* case involved resolution of whether a railroad's acquisition of a sleeping quarters constructed by another railroad in 1966 constituted "construction" of sleeping quarters.

road switching or humping operations after July, 1976."[7] *See United Transportation Union*, at 832. This statement by Justice Logan, a concurring justice, does not discuss whether or not the FRA has the authority to issue regulations defining "construction or reconstruction" as those terms are used in the Federal hours of service laws.

Moreover, the UTU ignores the further statement by Justice Logan that "judicial deference generally is reserved for agency views that have been reflected in formal pronouncements or have been known through other means for a long time." *Id.* at 831. This is exactly the situation we have here - according deference to the views of the Federal Railroad Administration which are reflected through formal pronouncements in the form of long-standing federal regulations. Justice Logan's statement, and the Tenth Circuit's decision, are consistent with the Eighth Circuit's decision in this case.

Finally, the UTU points to the Seventh Circuit's decision in *Atchison, Topeka and Santa Fe Railway Co. v. Pena*, 44 F.3d 437 (7th Cir. 1994), *aff'd*, 516 U.S. 152, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996).[8] for the proposition that the FRA's interpretation of the Federal hours of service laws is entitled to no deference. As acknowledged by the UTU however, the "Seventh Circuit was interpreting a different section of the HSA in that case." (*See UTU's Petition for Writ of Certiorari at 10, n. 4.*) In *Atchison*, the Seventh Circuit considered whether the FRA's new interpretation of hours of service laws relating to whether an employee's time spent waiting for deadhead transportation is time spent on duty was entitled to deference. *See Atchison*, 44 F.3d at 443. The FRA had changed its twenty-three year old interpretation of

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[7] However, Congress specifically considered this issue and included the grandfather clause for existing sleeping quarters.

[8] This Court affirmed the Seventh Circuit's interpretation of the HSA.

§61(b) of the HSA[9] and phrase "time spent on duty" only after the Ninth Circuit Court of Appeals rejected the FRA's interpretation of the statute in *Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). *Atchison*, 44 F.3d at 440.

In §61(b) of the HSA, Congress did not grant the FRA the express authority to make rules to implement the time on duty provisions. *Id.*, at 441. In this case, unlike in *Atchison*, the FRA has the authority to rule-make and to define the term "reconstruction." Moreover, in *Atchison*, the Seventh Circuit found that the FRA's new interpretation of a railroad employee's time on duty was not entitled to any deference as an interpretive rule. *Id.*, at 442-43. The Seventh Circuit concluded that the FRA's new interpretation could not be accorded even the slightest deference because the new interpretation of time on duty was: inconsistent with twenty-three years of FRA enforcement; not contemporaneously made with the legislation or its relevant amendments; not a thorough and reasoned interpretation; and only based on the fact that the Ninth Circuit Court of Appeals disagreed with the FRA's prior interpretation of the Federal hours of service laws. The Seventh Circuit rejected the FRA's new interpretation of time on duty, since it was not truly the FRA's interpretation, but the Ninth Circuit's.

Contrary to the regulations in *Atchison*, the federal regulations defining "reconstruction" of sleeping quarters must be accorded proper deference by the courts of this country. The regulations defining "reconstruction" have been in place for over twenty years and were adopted near the time the sleeping quarters legislation was enacted by Congress. These regulations were adopted only after the appropriate time for notice and comment. In issuing the regulations, the FRA studied the sleeping quarters provisions of the hours of service laws and the underlying purpose of these provisions. The regulations are consistent with

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[9] Formerly 45 U.S.C. §61(b), now codified at 49 U.S.C. §21103.

the intent of Congress in protecting railroad workers and have not been changed by the FRA after a "bad" court opinion. The FRA's adoption of the definition of "reconstruction" is thorough, valid and consistent. *See Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730, 736 (7th Cir. 1991). Accordingly, those regulations are entitled to deference. *See Morton*, 415 U.S. at 237, 94 S.Ct. at 1075.

In spite of the UTU's arguments, no conflict exists among the Federal Courts of Appeals regarding the Federal hours of service laws and the FRA's implementing regulations. Rather, the decisions of the Seventh, Eighth and Tenth Circuit Court of Appeals consistently accord deference to the FRA's rule making and statutory interpretations when that deference is due. Accordingly, this Court should deny the UTU's petition for writ of certiorari.

III. A SERIOUS SAFETY CONCERN IS NOT DIRECTLY IMPACTED BY THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS.

This Court "does not sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed.897 (1955). Because of the scarcity of resources and the immense number of petitions submitted, this Court properly limits its review to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Id.*, 349 U.S. at 79, 75 S.Ct. at 619. The narrow issue presented by the UTU's petition is not a question of importance to the public. This case is not about the FRA's authority to issue regulations or railroad employee safety, but rather, about whether the UTU and its members can direct a railroad's obligation to house its employees.

The UTU argues that this case presents important issues because it involves the health and safety concerns of railroad employees. What the UTU fails to acknowledge is that the HSA

was amended in 1976 to include the provision relating to sleeping quarters facilities in railyards as a result of Congress' concern about the health and safety of railroad workers. The FRA has furthered Congress' concerns by implementing regulations which ensure that railroads will not circumvent the sleeping quarters provisions and which further the safety related goals of these provisions. For example, the presence of the "50 percent" provision in the definition of reconstruction brings within the scope of "reconstruction" work that a railroad might characterize as something less than "rebuilding", but which nonetheless effectively results in a reconstruction of a facility in the immediate vicinity of an area where switching and humping operations are occurring. The practical effect of the FRA regulations defining the terms of the sleeping quarters provisions is to protect the safety and health of railroad employees while giving some consideration to a railroad's financial interest in existing sleeping quarters.

CONCLUSION

For all of the reasons stated herein, this Court should deny the UTU's petition for certiorari.

Respectfully submitted,

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No. 98-627

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED TRANSPORTATION UNION, PETITIONER

v.

RODNEY SLATER, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Railroad Administration's regulatory definition of the term "reconstruction" in 49 U.S.C. 21106(2) reflects a permissible exercise of rulemaking authority conferred by statute.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 149 F.3d 851. The decision of the Federal Railroad Administration (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on July 16, 1998. The petition for a writ of certiorari was filed on October 14, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal hours of service laws, known collectively prior to 1994 as the Hours of Service Act (HSA), are intended to promote railroad safety by ensuring that fatigue does not prevent railroad employees from properly performing their duties.[1] The Secretary of Transportation is charged with the administration of those laws. 49 U.S.C. 103(a). The Secretary has delegated those functions to the Administrator of the Federal Railroad Administration (FRA), a modal administration of the Department of Transportation (DOT). 49 U.S.C. 103(c); 49 C.F.R. 1.49(d).

In the Federal Railroad Safety Authorization Act of 1976, Congress amended the HSA to include two provisions relating to railroad employee sleeping quarters. Pub. L. No. 94-348, § 4(a), 90 Stat. 818. Those sleeping quarters serve as lodging at away-from-home terminals for train crews, providing them food and lodging during short-term layovers between tours of duty. The first of those provisions requires that all sleeping quarters must be "clean, safe, and sanitary" and must give residents "an opportunity for rest free from the interruptions caused by noise under the control of the carrier."

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[1] In 1994, Congress repealed the Hours of Service Act (then codified at 45 U.S.C. 61-64b) and the other federal railroad safety statutes and reenacted them as part of a broad recodification of the federal transportation laws. See Act of July 5, 1994, Pub. L. No. 103-272, § 1, 108 Stat. 745. They are now codified at 49 U.S.C. 20102, 21101-21108, and 21303-21304. The recodification made no substantive changes to those statutes, although it altered their arrangement and made editorial changes to many provisions, including those at issue in this case. See Pub. L. No. 103-272, § 6(a), 108 Stat. 1378; H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993). All references to the hours of service laws are to the recodified version.

49 U.S.C. 21106(1). The second sleeping quarter provision states:

> A railroad carrier and its officers and agents—
>
> * * * * *
>
> (2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed.

49 U.S.C. 21106(2).

While Section 21106(2) prohibits the "construction or reconstruction" of sleeping quarters in yards where potentially hazardous railroad switching and humping operations take place, it does not restrict the continued use of sleeping quarters that existed as of July 7, 1976. The hours of service laws do not define the term "reconstruction" or identify the point at which repair or renovation of an existing facility comes within the restrictions of Section 21106(2). In July 1978, after notice-and-comment rulemaking, the FRA promulgated a final rule implementing Section 21106(2). 43 Fed. Reg. 31,006. The regulations identify the prospective sleeping quarter locations that are subject to approval by the FRA, indicate the information that must be submitted with requests for location approvals, and discuss the general policy considerations that the FRA employs in ruling on requests for such approvals. *Id.* at 31,006-31,014; 49 C.F.R. Pt. 228, Subpt. C. In addition, the

regulations define the statutory term "reconstruction" as follows:

> *Reconstruction* shall refer to the—(i) Replacement of an existing facility with a new facility on the same site; or (ii) Rehabilitation or improvement of an existing facility (normal periodic maintenance excepted) involving the expenditure of an amount representing more than 50 percent of the cost of replacing such facility on the same site at the time the work of rehabilitation or improvement began, the replacement cost to be estimated on the basis of contemporary construction methods and materials.

43 Fed. Reg. at 31,009; 49 C.F.R. 228.101(c)(2).

2. Petitioner is a labor union that represents railroad employees, including employees of the Norfolk and Western Railway Company (N&W) who used sleeping quarters located in the railroad's yard in Moberly, Missouri.[2] The Moberly facility had been the subject of numerous complaints by N&W employees and petitioner. Petitioner asserted that the facility violated Section 21106(1) because it was not "clean, safe, and sanitary" and did not provide railroad employees with an adequate opportunity for undisturbed rest. C.A. App. 6-18. In addition, county health authorities inspected the facility and found several health and safety violations. *Id.* at 21-29.

In the spring of 1996, N&W decided to renovate the Moberly facility. C.A. App. 20. Because the Moberly facility is located "in an area or in the immediate vicinity of an area * * * in which railroad switching or

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[2] On September 1, 1998, the Norfolk and Western Railway Company ceased to exist upon its merger with the Norfolk Southern Railway Company. N & W Br. in Opp. 1 n.1.

humping operations are performed," 49 U.S.C. 21106(2), petitioner informed N&W that it opposed renovation, insisting instead on the construction of a new facility away from the railroad yard. C.A. App. 45-46. N&W responded that the planned renovation would take place and that the railroad had prepared renovation plans addressing the poor conditions that the employees and the county had cited. *Id.* at 51-55.

In September 1996, petitioner raised its objections to N&W's renovation plans with the FRA, prompting the FRA to conduct its own inspection of the Moberly facility to determine whether it was operating in violation of Section 21106. C.A. App. 58-59. The FRA's inspector found that the facility was not "clean, safe, and sanitary" as required by Section 21106(1) and that noise levels from the train yard prevented proper, undisturbed sleep, but he did not recommend that N&W be held in violation of that Section. *Id.* at 64-65. Instead, he chose to give the railroad an opportunity to cure the facility's deficiencies. *Id.* at 66. The FRA also determined, based on information provided by N&W, that the cost of N&W's planned renovations would be approximately 25 percent of the cost of replacing the facility at a different location. *Id.* at 48-50, 84-87.

In a February 1997 letter to petitioner's General Chairman, the FRA Administrator responded to petitioner's objections regarding the condition of the Moberly facility and the propriety of N&W's planned renovations. The Administrator stated that the FRA would give N&W a reasonable amount of time to correct sanitary problems found in FRA's inspection of the facility, that additional testing by FRA indicated that the facility met the noise standard of Section 21106(1), and that the cost of N&W's planned renovations would be approximately 25 percent of the cost of a new facility

and therefore did not qualify as "reconstruction" within the meaning of Section 21106(2).[3] Pet. App. 12a-15a. The Administrator therefore denied petitioner's request that the FRA prevent N&W from renovating the Moberly facility.

3. The court of appeals affirmed the FRA's decision. Pet. App. 1a-8a.[4] The court held that "[t]he term 'reconstruction,' as used in § 21106(2), is imprecise and unclear." *Id.* at 7a. The court therefore held that, under this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "the question of [that term's] precise meaning is just the kind of question for which we should defer to the administering agency for a regulatory answer." Pet. App. 7a. The court of appeals rejected petitioner's contention that the FRA's rulemaking authority under Section 21106(2) is limited to defining the term "immediate vicinity." See *id.* at 5a, 7a. Finally, the court held that the FRA's definition of "reconstruction" is not arbitrary, capricious, or contrary to law because Section 21106(2) "contemplates some degree of renovation or improvement" of facilities constructed before July 7, 1976. *Ibid.*[5]

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[3] Petitioner's contention (Pet. 5) that "[i]t is undisputed that the railroad intends to begin a major reconstruction of its sleeping quarters" is obviously incorrect.

[4] Any "final action of the Secretary of Transportation" under the hours of service laws is reviewable in the court of appeals pursuant to the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* See 28 U.S.C. 2342(7); 49 U.S.C. 20114(c).

[5] Petitioner also contended that the FRA had arbitrarily failed to find the Moberly facility in violation of Section 21106(1). The court of appeals held that that claim was moot in light of the planned renovation of the building. Pet. App. 8a. Petitioner does not seek review of that holding.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends that "[t]he Seventh, Eighth and Tenth Circuits have reached differing conclusions regarding the powers of the FRA to promulgate regulations under the" hours of service laws. Pet. 9. That contention is incorrect.

Petitioner's reliance on *United Transportation Union* v. *Dole*, 797 F.2d 823 (10th Cir. 1986), is particularly misplaced. That case addressed the question whether a railroad's proposed reopening of pre-1976 rail yard sleeping quarters that it had purchased from another railroad after 1976 fell under the FRA's regulatory definition of the term "construction" as used in Section 21106(2). See 797 F.2d at 829-830. The FRA's statutory authority to issue that or any other regulation implementing Section 21106(2) was not at issue in the case. Petitioner's sole basis for suggesting the existence of a circuit conflict is the statement in a *concurring* opinion that Congress, in enacting Section 21106(2), intended "that a railroad should make no significant additional investment in sleeping quarters near hazardous switching or humping operations after July 1976." 797 F.2d at 832 (Logan, J., concurring). That statement was not part of the opinion for the Tenth Circuit panel. In any event, the concurring judge did not attempt to define the point at which "additional investment in sleeping quarters" becomes so "significant" as to constitute "construction" or "reconstruction" within the meaning of Section 21106(2).

Petitioner's reliance (Pet. 10-11) on *Atchison, Topeka and Santa Fe Railway* v. *Peña*, 44 F.3d 437 (7th Cir. 1994) (en banc), aff'd, 516 U.S. 152 (1996) (*ATSF*), is also misplaced. In *ATSF*, the Seventh Circuit held that an interpretive rule issued by the FRA concerning certain duty time provisions of the hours of service laws was not entitled to deference. 44 F.3d at 441-444. The statutory provisions at issue in *ATSF*, however, did not grant the agency any general rulemaking authority. Moreover, the interpretive rule under review in that case did not reflect the agency's independent exercise of expert judgment. Rather, the FRA had simply chosen to acquiesce, on a nationwide basis, in the decision of a single court of appeals, thereby reversing a 23-year-old agency interpretation of the pertinent statutory provision. *Id.* at 441-444.

The instant case is distinguishable from *ATSF* in several important respects. The statutory provision at issue here includes an express grant of rulemaking authority that exists nowhere else in the hours of service laws.[6] Moreover, the FRA's definition of "reconstruction" has been unchanged for 20 years, was adopted through notice-and-comment rulemaking, and represents the agency's independent judgment regard-

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[6] As petitioner conceded in the court of appeals (Pet. C.A. Rep. Br. 5 n.2), an agency's interpretation of a statutory provision that defines the scope of its jurisdiction or authority is entitled to deference. See, *e.g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 844-845 (1986); see also *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring). Such deference to an agency's interpretation of its statutory authority includes deference to interpretations of provisions defining the scope of agency rulemaking authority. See *Chemical Mfrs. Assoc.* v. *EPA*, 919 F.2d 158, 162-163 (D.C. Cir. 1990).

ing the proper construction of the statutory term. Petitioner's claim of a circuit conflict is therefore unfounded.[7]

2. Petitioner contends (Pet. 12-14) that the FRA's rulemaking authority under Section 21106(2) is limited to defining the term "immediate vicinity." That claim is incorrect. The text of the statute imposes no such limitation.[8] The legislative history on which petitioner relies (Pet. 7-8) also does not support its position. The House Report notes that under the Hours of Service Act, "[t]he Secretary, after appropriate rulemaking, may determine that sleeping quarters shall be a specific distance away from the area of switching." H.R. Rep. No. 1166, 94th Cong., 2d Sess. 11 (1976). The House Report does not address the question whether the Secretary may promulgate regulations concerning other

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[7] Similarly wide of the mark is petitioner's implication (see Pet. 11-12) that the FRA's requests to Congress to expand its regulatory authority under the hours of service laws show that the agency does not currently have the authority to define "reconstruction." The FRA congressional testimony cited in support of that proposition addresses portions of the hours of service laws unrelated to the sleeping quarters provisions. The FRA has never specifically requested a statutory expansion of its rulemaking authority under Section 21106(2).

[8] Petitioner relies (Pet. 14) on the principle that "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.33 (5th ed. 1992). Courts have refrained from applying that guideline, however, "when evident sense and meaning require a different construction." *Mandina* v. *United States*, 472 F.2d 1110, 1112 (8th Cir.), cert. denied, 412 U.S. 907 (1973). As we explain below, the FRA's decision to promulgate a regulatory definition of the term "reconstruction" serves the purposes of Section 21106(2) by providing clear guidance as to the line between lawful and unlawful conduct.

aspects of Section 21106(2). Contrary to petitioner's suggestion (Pet. 7-8), that Report neither explicitly nor implicitly suggests that the Secretary's rulemaking authority under Section 21106(2) is limited to defining the term "immediate vicinity." To the contrary, as the court of appeals recognized, "[t]he term 'reconstruction,' as used in § 21106(2), is imprecise and unclear. Therefore, under *Chevron*, the question of its precise meaning is just the kind of question for which we should defer to the administering agency for a regulatory answer." Pet. App. 7a.

Section 21106(2) clearly allows pre-existing sleeping quarters to remain in operation, even where a facility is located "in an area or in the immediate vicinity of an area * * * in which railroad switching or humping operations are performed." Congress thus declined to subject railroads to the expense that would have resulted from an abandonment of existing facilities. The statute presumably contemplates that some degree of repair or renovation will be permitted on those facilities; a contrary reading would prohibit even work done to ensure that the facilities are "clean, safe, and sanitary" as required by Section 21106(1). The FRA's definition of "reconstruction" permits "[r]ehabilitation or improvement of an existing facility" if, but only if, that approach costs no more than 50% of the cost of replacing the facility. 49 C.F.R. 228.101(c)(2)(ii). The FRA's regulatory definition reasonably balances Section 21106's competing objectives, and the court of appeals correctly sustained it.[9]

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[9] Petitioner also cites several authorities relating to the impact of railroad employee fatigue on safety (Pet. 14-17) and then concludes (Pet. 17) that the decision below will have "serious consequences to safe railroad operations." There is no dispute that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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providing railroad employees with adequate opportunities for rest is an integral component of safe railroad operations. Nothing in the hours of service laws suggests, however, that Congress regards the FRA's definition of "reconstruction" as inconsistent with railroad safety.